FILED
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HAROLD B. WILLEY,

IN THE

Supreme Court of the United States

October Term, 1955

No. 740

LORENTZ LUDVIGSEN,

Petitioner,

—against—

COMMERCIAL STEVEDORING CO., INC., and A/S L. J. MOWINCKELS REDERI,

Respondents.

PETITIONER'S REPLY BRIEF

In the petition herein, there is presented a carefully documented analysis of the record and of the testimony, supported by quotations from the actual testimony. Based on that analysis, it is asserted that there is no evidence in any way conflicting with the testimony by and on behalf of the petitioner. That testimony being thus uncontroverted, not being improbable, the credibility of petitioner and his disinterested witnesses not having been impeached, it is contended that the decisions of the District Court and of the Court of Appeals are in conflict with a decision of this Court (*Chesapeake & Ohio Railway v. Martin*, 283 U. S. 209).

This, briefly stated, is the main issue respondents were called on to meet.

The briefs of both respondents fail to do so. They wholly fail to show the existence of any controverted material questions and of any support for the decisions of the Courts below.

The brief of respondent Commercial Stevedoring Co., Inc., purports to state the evidence in the case. It does so without a single reference to the record, notwithstanding the requirement of Rule 40(e) of the Rules of this Court. This is not the result of carelessness or oversight. The conspicuous inaccuracies of the purported statement of fact—inaccuracies which can hardly be unintentional—would have been seriously embarrassed by references to the record which do not support them. To establish their inaccuracies would unduly lengthen this brief. The undocumented assertions, contrasted with the careful documentation of petitioner's brief, carry their own refutation.

Nor does the brief or respondent Mowinckels Rederi meet the issue. It is wholly devoid of a showing of any testimony disputing the petitioner's case. Such references to the record as there are in that brief as to the material issues in the case—the creation and existence of slack in the ladder at the time of petitioner's accident—show that the testimony of respondent's witnesses on this subject consisted solely of disclaimers of knowledge or lack of recollection. The accuracy of the summary of the testimony of respondents' witnesses as set forth with meticulous care and references to the record in the petition (p. 10) is not disputed.

All this respondent is able to do in order to support the decisions of the courts below is to quote from the Trial Court's opinion:

"The testimony of the libelant's witneses is in direct conflict with the evidence of the witnesses of the respondent as to whether there was a slack in the ladder."

This bald statement, wholly unsupported in the Trial Judge's opinion, is likewise wholly unsupported in the briefs of respondents.

In these circumstances, *United States* v. *Yellow Cab Co.*, 338 U. S. 338, cited in support of respondent's position, is wholly inapplicable. In that case, as Mr. Justice Jackson said (342), *"the evidence would support a conclusion either way"* and "the Trial Judge has decided it to weigh more heavily for the defendants". In such a case, the Court said, "a choice *between two permissible views of the weight of evidence* is not 'clearly erroneous' " (Emphasis supplied.)

In the case at bar, there is no question of the weight of evidence. The evidence here is all on one side of the scale; on the other side, there is none.

The Court of Appeals of the Second Circuit, apparently as a matter of settled policy, has indicated in a long line of decisions that it will not review the weight of evidence: *Petterson Lighterage* v. *New York Central,* 126 F. (2) 992, 994-5; *Crane* v. *Evans Transportation Co.,* 155 F (2) 940, 941; *Fodera* v. *Booth Shipping Corp.,* 159 F. (2) 795, 797; *Roberts* v. *United States,* 186 F. (2) 1005, 1006; *Kilgust* v. *United States,* 191 F. (2) 69.

This position is in sharp contrast to and conflict with that of the Court of Appeals of at least one other Circuit. In *State Farm Mutual Auto Insurance Co.* v. *Bonacci,* 111 F. (2) 412, that Court stated:

> "'Under the new practice, where findings are made by the Court without a jury, the appellate court is not limited to the mere question whether there is any substantial evidence to support them but *may set them aside if against the clear weight of the evidence.* * * *'" (Emphasis supplied.)

In pursuing its policy, the Court of Appeals of the Second Circuit has even gone so far as to refuse to follow this Court's holding in *Chesapeake & Ohio* v. *Martin, supra.* In doing so, the Court argued (*Broadcast Music* v. *Havana Madrid Restaurant Corp.*, 175 F. (2) 377; *Golden Eagle* v. *Approved Dehydrating*, 147 F. (2) 359, 360), that what it described as the "so-called 'uncontroverted testimony'" rule does not mean what the opinion of this Court plainly and explicitly states to be the law.

The Courts of Appeals in the other Circuits have accepted and followed the mandate of this Court in the *Chesapeake & Ohio* case: *National Labor Relations Board* v. *McGough Bakeries*, 153 F. (2) 420, 425 (5 Cir.); *Alabama Trust Co.* v. *Millsap*, 71 F. (2) 518, 520 (5 Cir.); *Stillwell* v. *Hertz Drivurself*, 174 F. (2) 714, 717 (3 Cor.); *Grace Bros.* v. *Commissioner of Internal Revenue*, 173 F. (2) 170, 174 (9 Cir.); *Nicholas* v. *Davis*, 204 F. (2) 200, 202 (10 Cir.); *Nicholas* v. *Timpte*, 216 F. (2) 434, 436 (10 Cir.); *San Francisco Association* v. *Industrial Aid*, 52 F. (2) 532, 536 (8 Cir.); *Twentieth Century-Fox Film Corporation* v. *Duckhaus*, 153 F. (2) 893, 899-900 (8 Cir.).

The position thus taken by the Second Circuit is the more difficult to understand in view of its very effective statement of the danger of making a District Judge the final arbiter on questions of fact. In the *Broadcast Music* case, *supra*, that Court wrote:

> "Without doubt, the result of our procedure is to vest the trial judge with immense power *not subject to correction even if misused*: His estimate of an orally testifying witness' credibility may stem from the trial judge's application of an absurd rule-of-thumb, such as that when a witness wipes his hands during his testimony, unquestionably he is lying;* but unless the judge reveals of record that he used such an irrational test of credibility, *an upper court can do nothing to correct his error.* We thus have what Tourtoulon called the 'sovereignty' of the trial judge." (Emphasis supplied.)

This confession of judicial impotence to correct an error, when the error happens to be one of fact, is wholly out of line with the genius and spirit of our laws as it is with the decisions of this Court and of other Courts of Appeal.

The so-called "two-court rule" which is cited has no conceivable application to the situation here. That rule is applied to cases where *on conflicting evidence,* the lower courts have concurred in a decision. It does not apply to a case such as here where there is no conflict in evidence. Indeed, in the *Chesapeake & Ohio* case, *supra,* the judgment based on a jury's verdict, *had been concurred in by the two lower courts.* Nevertheless, this Court, on review, reversed.

Quescia v. *United States,* 289 U. S. 466, 468.

Nor is it true that this Court will not reverse on questions of fact even where two courts concurred. In the very passage from *United States* v. *Yellow Cab Co., supra,* quoted in respondent's brief, Mr. Justice Jackson said, "of course, it would be our duty to correct clear error, *even in findings of fact*". (Emphasis supplied.)

Clear error is unquestionably present in this case.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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